



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Reserved on: 21st November, 2024
Pronounced on: 27th November, 2024

+ **W.P.(C) 9449/2024 & CM APPL. 67808/2024 (for directions)**

KSHITIJ GUPTA

.....Petitioner

Through: Mr. Kumar Abhishek and Ms.
Anamika Mishra, Advocates with
Petitioner (in-Person).

versus

UNION OF INDIA & ORS.

.....Respondents

Through: Ms. Nidhi Raman, CGSC with Mr.
Zubin Singh, Ms. Rashi Kapoor and
Mr. Akash Mishra, Advocates with
Mr. Gokul Sharma, G.P. for R-1 & 2.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J.:

1. Mr. Kshitij Gupta, a citizen of the United States of America holding the status of an Overseas Citizen of India,¹ has invoked the jurisdiction of this Court under Article 226 of the Constitution of India, 1950. He challenges the denial of his application for special work permission, as communicated to him on 3rd July, 2024 by the Foreigners Regional

¹ "OCI"



Registration Office,² Respondent No. 3. The permission was sought in connection with an employment offer extended to him by the British High Commission, New Delhi for the post of Country Based Clearance Officer at Grade – Executive Officer. The requirement for an OCI cardholder to obtain a special work permit, prior to employment in any diplomatic mission in India is stipulated in notification dated 4th March, 2021, issued by the Ministry of Home Affairs.³

FACTURAL MATRIX

2. The backdrop leading to present petition is as follows:

2.1. The Petitioner is a citizen of the United States of America since 17th September, 2008 and was issued an OCI card on 28th September, 2009. He currently resides in New Delhi, India with his parents after returning from the U.S.A.

2.2. In October, 2023, the Petitioner applied for the role of Country Based Clearance Officer at Grade – Executive Officer at the British High Commission, New Delhi. After successfully navigating the selection process, he received an employment offer on 20th December, 2023, which he duly accepted.

2.3. Concurrently, the Petitioner initiated the process of obtaining the mandatory special work permit required for employment in diplomatic missions by submitting an application to the FRRO. His application was acknowledged on 15th December, 2023 and forwarded for further processing on 20th December, 2023. On 7th March, 2024, the British High Commission informed him that he had been placed on a reserved list effective 28th

² “FRRO”

³ “MHA”



November, 2023. This list allows a 12-month period for candidates to secure a special work permit, failing which they may reapply for future opportunities.

2.4. While pursuing the matter with the MHA and the Consular, Passport and Visa Division of the Ministry of External Affairs,⁴ the Petitioner was informed that his application required approval from the Protocol Division, MEA, owing to his status as a third country national. Ultimately, on 25th June, 2024, the online portal reflected the status of denial of Petitioner's request.

2.5. Thereafter, on 3rd July, 2024, the FRRO formally intimated the decision and advised him to approach Protocol-III Division, MEA *via* the British High Commission.

2.6. Subsequently, on 30th July, 2024, the British High Commission formally requested Protocol-II Division, MEA to issue the requisite special work permit to the Petitioner. However, this request was declined by the MEA through a Note Verbale dated 19th October, 2024.

2.7. Aggrieved by these developments, the Petitioner has approached this Court seeking directions to the Consular, Passport and Visa and Overseas Indian Affairs Division of MEA to issue a No-Objection Certificate, along with directions to the MHA to approve his application for a special work permit.

PETITIONER'S CONTENTIONS

3. In the above background, the counsel for Petitioner makes the following submissions:

⁴ "MEA"



3.1. Petitioner's application for the special work permit is time-sensitive. While the MHA processed and forwarded the application expeditiously to the MEA, the procedural clearance by the MEA was inordinately delayed for over four months. Ultimately, the application was denied by the MEA on 25th June, 2024, without disclosing any reasons, rendering the Petitioner's efforts futile.

3.2. During the pendency of his application, the British High Commission, New Delhi, advertised similar positions on two occasions—29th March, 2024 and 20th May, 2024. Had the special work permit been granted in a timely manner, the Petitioner could have secured employment.

3.3. The Petitioner satisfies the eligibility criteria and due procedure was adhered to by both the Petitioner and the British High Commission. All requisite information sought by Protocol-II Division, MEA was promptly furnished by the British High Commission. Despite a formal request made by the Commission on 30th July, 2024 for issuance of the permit, the MEA wrongfully rejected the Petitioner's application, unjustly depriving the Petitioner of a legitimate employment opportunity.

RESPONDENTS' CASE

4. *Per contra*, Ms. Nidhi Raman, CGSC for the Respondents defends the impugned action and makes the following submissions:

4.1. The employment of Third Country nationals by Foreign Representations in India is governed by principles of reciprocity, predicated on presumed assurances by the sending state—in this case, the United Kingdom—to allow similar requests from the receiving state, i.e., India. This principle is enshrined in Chapter XXXIV of the Protocol Handbook



issued by the Protocol Division, MEA,⁵ which lays down the prerequisites for employment of third country and home country nationals by foreign missions. The rationale is to preserve India's diplomatic relations, safeguard its sovereign interests and prioritize employment opportunities for qualified Indian citizens. Further, Article 8 of the Vienna Convention on Diplomatic Relations, 1961, governs the nationality of members of diplomatic staff, stipulating that such individuals should generally be nationals of the sending state. However, it allows the receiving state to authorize the employment of individuals who are nationals of either the receiving state or a third country. The Note Verbale issued by the MEA on 5th January, 2024 mandates that foreign representations must obtain prior approval before employing or engaging an OCI cardholder.

4.2. The Petitioner and the British High Commission, failed to adhere to the procedural requirements. The communication dated 30th July, 2024 from the British High Commission to Protocol-II, MEA, is deficient in several respects:

- i. The communication was issued nearly seven months after extending the offer of employment to the Petitioner, reflecting an undue delay.
- ii. It furnished the Petitioner's particulars and indicated the Commission's intent to employ him, but lacked any cogent justification for appointing a third country national to a local post, as mandated by the Protocol Handbook.
- iii. The communication ambiguously sought a special work permit for the Petitioner, who had been placed on a reserved list, without specifying the

⁵ "the Protocol Handbook"



nature of the position he would be offered in the future.

4.3. In light of these deficiencies, Protocol-II Division, MEA, through its communication dated 19th October, 2024, conveyed its reasons for declining the request to the British High Commission.

4.4. There is no express or implied assurance of reciprocity from the United Kingdom that would apply to the instant case. The absence of such reciprocity not only undermines India's sovereign and diplomatic interests but also impacts public interest.

ANALYSIS AND FINDINGS

5. Having considered the submissions of both parties and perused the records, the Court proceeds to examine the issues at hand.

Notification and Eligibility

6. The Petitioner, an American citizen and OCI cardholder, had applied for the position of Country Based Entry Clearance Officer, Grade – EO, as advertised by the British High Commission. The role involves accessing and handling classified or sensitive commercial information, and restricts eligibility to nationals of specific countries. The relevant excerpt from the job posting stipulates:

***“Please note:** The role will involve access to and handling of classified or sensitive commercial information therefore, Applicant must already hold a minimum of the UK's SC level of clearance or be able to achieve it. Because of the security clearance requirement mentioned above, only nationals of the following countries are eligible to apply:
UK or other EU country, Canada, Australia, USA, New Zealand.”*

7. As per the notification dated 4th March, 2021 issued by the MHA under Section 7B(1) of the Citizenship Act, 1955, OCI cardholders enjoy certain rights and privileges but are subject to specific conditions. One such



condition mandates obtaining special permission from the competent authority—the FRRO or the relevant Indian Mission—for employment in any foreign diplomatic mission within India.

8. The Petitioner contends that the notification applies prospectively and should not affect his application. However, since the job posting arose after the issuance of the notification, the requirement for work permit is fully applicable to his case. Thus, notwithstanding the Petitioner’s eligibility and suitability for the job, he is obligated to obtain a special work permit.

Note Verbale dated 5th January, 2024 and 19th October, 2024

9. The employment of OCI card holders is additionally governed by the Note Verbale dated 5th January, 2024 issued by Protocol-II Division, MEA. It mandates Diplomatic Missions to seek prior permission of MEA before employing an OCI cardholder in any capacity such as internship, research assignment, part-time employment, full time employment, diplomatic and official assignment or in any other capacity, whether remunerated or non-remunerated, in India. The said Note reads as follows:



भारत गुरुवार
ONE BARR - ONE WORLD - ONE FUTURE

न्यायार-II अनुषाग

विदेश मंत्रालय, नई दिल्ली
MINISTRY OF EXTERNAL AFFAIRS
NEW DELHI

Protocol-II Section

1095, Jawaharlal Nehru Bhawan,
Janpath, New Delhi-11
Tel:- 23085524 Fax:- 23085576

No. D-II/451/04(01)/2023

5 January, 2024

The Ministry of External Affairs presents its compliments to all Diplomatic Missions, Posts, Offices of UN and its Specialized Agencies and other accredited International Organizations in India and has the honour to reiterate extant guidelines of the Government of India concerning OCI (Overseas Citizenship of India) cardholders taking up employment on diplomatic/official assignment or in any other capacity in foreign Missions, International Organizations etc. in India.

Attention of the esteemed Diplomatic Mission/ IO is drawn to the notification dated 4th March, 2021 issued by the Ministry of Home Affairs, published in the Gazette of India and available online, which inter alia requires that an OCI cardholder can travel to India for any purpose except in the cases mentioned below for which the OCI cardholder will have to obtain special permission or a special permit from the competent authority or the FRRO or the Indian Mission abroad:

- to undertake research;
- to undertake any Missionary or Tabligh or Mountaineering or Journalist activities;
- to undertake internship in any foreign Diplomatic Missions in India;
- to visit any place which falls within the Protected or Restricted or prohibited areas as notified by the Central Government or competent authority.;

It is further informed that esteemed Diplomatic Mission, Office of UN and its Specialized Agency and any other accredited International Organization is invariably required to seek prior permission of the Ministry of External Affairs before employing or assigning any person who is an OCI

TIC

Signature

Signature Not Verified

Digitally Signed
By: NITIN KAIN
Signing Date: 27.11.2024
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cardholder on internship, research assignment, part-time employment, full time employment, diplomatic and official assignment or in any other capacity, whether remunerated or non-remunerated, in India. Similar permission shall also be obtained in respect of family members of the principal who are OCI card holders.

Any existing cases of such employment or assignment in your organization or in affiliated Institutions and offices should be immediately brought to the attention of Protocol II Section of this Ministry for regularization.

The Ministry of External Affairs presents its compliments to all Diplomatic Missions, Posts, Offices of UN and its Specialized Agencies and other accredited International Organizations in India the assurances of its highest consideration.

**All Diplomatic Missions, Posts
Offices of UN and its Specialized Agencies and
Other Accredited International Organizations in India**



T/K
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10. On 30th July, 2024, the British High Commission communicated its intent to employ the Petitioner and requested Protocol-II Division, MEA to issue the special permit. The said communication reads to the following effect:

“The British High Commission in India presents its compliments to the Ministry of External Affairs, Government of India and has the honour to enclose the details of Mr Kshitij Gupta.

The British High Commission have been informed by Mr. Gupta that the



Protocol-II Section of the Ministry of External Affairs, would like an official correspondence regarding his offer and reserved status with regards to his application for the role of Country Based Entry Clearance Officer (ECO) at Grade - Executive Officer (EO).

The British High Commission would like to inform that Mr Kshitij Gupta was offered the role of Country Based Entry Clearance Officer (ECO) (open to foreign nationals/OCI card holders) in December 2023, subject to him obtaining the special work permit from Government of India. However, his offer was revoked in March 2024 following his inability to secure a special work permit. Hence, he was placed on a reserved list for a period of 12 months from his original date of interview, wherein British High Commission may get in touch with him, only if, a similar opportunity arises in future and subject to him securing a valid special work permit, which would enable him to work with the organisation.

As special work permit from Government of India is a mandatory requirement for OCI card holders to work in any diplomatic mission, hence the British High Commission would request you to issue a special work permit to Mr. Gupta.

The personal details for Mr. Gupta, as furnished by him in his job application form are listed below:

Name of Foreign Representation: British High Commission, New Delhi

<i>S No.</i>	<i>Name and Designation</i>	<i>Date of Birth</i>	<i>Passport No. Date & place of Issue</i>	<i>Date of arrival In India</i>	<i>Residential Address & Tel. No.</i>	<i>Particulars of accompanying member(s) of family</i>
<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>	<i>6</i>	<i>7</i>
<i>1</i>	<i>Mr Kshitij Gupta</i>	<i>29th November 1983</i>	<i>567318873</i>	<i>Not Furnished</i>	<i>33 Hanuman Road, New Delhi 110001. +91-9910201737</i>	<i>Not Furnished</i>

The British High Commission avails itself of this opportunity to renew to the Ministry the assurances of its highest consideration.”



11. However, the afore-noted request was denied through the Note Verbale dated 19th October, 2024. The said Note is extracted hereunder:

 G20 2023 India Presidency भारत 2023	 75 आज़ादी का अमृत महोत्सव	 भारत गणराज्य	Annexure R-2 - 8 विदेश मंत्रालय, नई दिल्ली MINISTRY OF EXTERNAL AFFAIRS NEW DELHI न्याय-II अनुभाग, Protocol-II Section, दूरभाष/Tel - 23085424 फैक्स/Fax - 23085576 Email: protocol2@mea.gov.in
N ^o D-II/451/04(01)/2023			19 October 2024
The Ministry of External Affairs in New Delhi presents its compliments to the British High Commission, New Delhi and has the honour to refer latter's Note Verbale No. CH/646/24 dated 30 July 2024 regarding employment of Mr. Kshitej Gupta US national, OCI card holder, to be employed as a country based entry clearance officer at British High Commission, New Delhi. The proposal of the esteemed High Commission has been examined by the Ministry and it is found that the High Commission has failed to provide a valid work permit/OCI activity authorization from the relevant Indian authority. In absence of the required authorization, the above request cannot be acceded to. The Ministry of External Affairs avails itself of this opportunity to renew to the British High Commission, New Delhi the assurances of its highest consideration. British High Commission, New Delhi			
			

12. The aforesaid denial was based on non-compliance with the provisions of the Protocol Handbook which requires a justification when a third country national is being employed against a local post. To this effect, Clause 1 of Chapter XXXIV of the Protocol Handbook reads as under:



“1. The FRs are supposed to employ either home country nationals as staff members in official capacity with valid official/service passports or Indian nationals as locally recruited support staff. Third country/ home country nationals should not be employed against a local post in general. FRs desirous to employ Third country/Home Country nationals against local posts will seek prior approval of the Ministry of External Affairs (through Protocol-II Section) with proper justifications and by submitting particulars of the prospective employee to Protocol-II Section for processing visa. Each request will be examined on case to case basis.”

13. Upon examining the communication dated 30th July, 2024, issued by British High Commission, it becomes apparent that the while a request was made for issuance of a special permit for the Petitioner, no justification was offered for appointing a third country national. The absence of such justification, according to the Indian authorities, raises legitimate concerns about prioritizing foreign nationals for roles that should ideally serve local employment interests. Such an appointment has broader implications, including the displacement of employment opportunities for Indian citizens. Moreover, the job posting in question does not specify any qualifications or expertise unique to the Petitioner that could not reasonably be fulfilled by an Indian citizen.

14. On this issue, on 28th October, 2024, in order to find a resolution, the Petitioner was directed to confirm whether the British High Commission was willing to reapply to the MEA, providing proper justification for employing a third country national against the job posting post, as required under the Protocol Handbook.

15. Pursuant to the afore-noted directions, the Petitioner corresponded with British High Commission and in response, the Commission issued communication dated 6th November, 2024 stating that Protocol-II Division, MEA has not sought any further justification from the Commission



regarding Petitioner's employment. The British High Commission has, however, expressed its willingness to provide such justification, should the Protocol Division directly seek it from them. To this effect, the communication reads as follows:

"Dear Kshitij,

We hope this message finds you well. This is to acknowledge the receipt of your email.

We understand that in continuation to your special work permit grant request from MEA, you would like to seek further justification from us on the role requirements and your candidature considerations for the role of Country Based Entry Clearance Officer (ECO). We wanted to apprise you that as per the last communication received by us from MEA, we were not requested for any further information on the note verbale.

While we are keen to support you, however, we would require the Protocol Division, MEA, Government of India to contact us directly and we would provide the required details, as requested by them. Also, you may share the legal requirements from the Hon'ble Delhi High Court with them to expedite the request.

Thank you for your understanding and patience."

16. In light of the afore-mentioned developments, the Petitioner filed CM APPL. 67808/2024, seeking directions from this Court to mandate the Respondents to engage proactively with the British High Commission to obtain the necessary justifications concerning his employment. The Petitioner requests the Court to compel the MEA to initiate communication with the British High Commission and seek requisite explanations for employing a third country national.

17. The Respondents remain resolute on this issue. They assert that it is incumbent upon the British High Commission to initiate diplomatic channels and not the other way around. The MEA emphasizes that if the British High Commission intends to employ a third country national, the onus lies squarely upon them to furnish a cogent justification for such an



appointment, as mandated by the Protocol Handbook. Reversing this protocol would not only undermine the established diplomatic procedures but also set an undesirable precedent.

18. The Court concurs with the stance of the Respondents. The Protocol Handbook clearly stipulates that foreign representations must proactively seek approval from the MEA, providing detailed justifications for appointments of third country nationals. In this case, the British High Commission's communication lacked the requisite justification. The diplomatic communications are sensitive and adhere to strict protocols to respect the sovereignty and procedural norms of both nations involved. The responsibility to provide justifications for employment decisions rests unequivocally with the British High Commission. It is neither appropriate nor within the purview of this Court to issue a *mandamus* compelling the MEA to deviate from these protocols, especially when the initiating action is expected from the foreign state seeking the exception. Judicial intervention to facilitate such exchanges is beyond the Court's remit. Therefore, the Court finds no merit in the Petitioner's request to compel the Respondents to engage with the British High Commission in the manner sought. Accordingly, the request made in application CM APPL. 67808/2024 is declined.

Issue of Reciprocity and Diplomatic Considerations

19. The Respondents have raised the issue of reciprocity, a fundamental principle in diplomatic relations. As per Clause (3)(a) of Chapter XXXIV of the Protocol Handbook, permission to employ third country nationals is granted based on presumed assurances of reciprocity by the sending state. The said provision reads as follows:



“3. The employment of third country/home country nationals are governed by following conditions:

- a) Permission granted shall be on the basis of presumed assurances of reciprocity by the Sending State in allowing similar requests from the Government of the Republic of India;*
- b) The employee would not hold Diplomatic/Official/Service/ Special Passport;*
- c) The employee would avail “Employment Visa”;*
- d) The locally recruited foreign employee would not enjoy any privilege and he/she would be treated at par with all other local employees;*
- e) The employment shall be subject to the fiscal, social security and exchange control regulations of India.”*

20. To establish the existence of reciprocity between India and the United Kingdom, the Petitioner relied on an advertisement dated 13th May, 2021 issued by the Indian High Commission in London for the posts of Electrician and Senior System Analyst. One of the conditions specified therein was: *“It is mandatory for the applicants to have a long-term valid UK work permit/visa if they are not UK nationals.”* Similarly, the Petitioner cited another advertisement posted by the UK High Commission in Washington, D.C., stating: *“If you are not a US citizen or a US Permanent Resident, or the dependant of a diplomat (with an EAD card), you may not be eligible for employment with the UK Government.”* The Petitioner argued that these advertisements demonstrate a reciprocal practice between India and the United Kingdom in employing third country nationals in their respective diplomatic missions. This, according to the Petitioner, establishes the principle of reciprocity.

21. Reciprocity is a foundational principle in diplomatic relations, ensuring mutual respect and equitable treatment between nations. In absence of an explicit assurance of reciprocity from the United Kingdom regarding the employment of Indian nationals in similar capacities within their



missions, the Respondents are justified in exercising caution. The British High Commission has not provided any written assurance or evidence of reciprocal arrangements, undermining the basis for granting an exception in this case.

22. The Court also finds merit in the contentions advanced by Ms. Raman that the Petitioner has misconstrued the afore-mentioned advertisements to establish reciprocity between India and the United Kingdom. As regards the advertisement issued by the Indian High Commission in London, it allowed both nationals of the United Kingdom and foreign nationals with valid work permits to apply. It does not, in any manner, imply that only third country nationals were eligible for the positions. This is in stark contrast to the job posting which specifically restricted eligibility for the role of Country-Based Clearance Officer to nationals of five designated countries. Thus, the two job scenarios are fundamentally distinct, and the principle of reciprocity is inapplicable in this context.

23. Additionally, the advertisement from the UK High Commission in Washington, D.C., stipulated eligibility primarily for U.S. citizens, permanent residents, or dependents of diplomats with appropriate authorization. This, contrary to Petitioner's contentions, reflects a standard practice of prioritizing local nationals for employment within diplomatic missions, aligning with international norms and the Vienna Convention on Diplomatic Relations, 1961. The British High Commission's approach in New Delhi deviates from this practice by preferring third country nationals over the host country's citizens for local positions. Such selective hiring practices not only undermine the principle of reciprocity but also raise significant concerns related to national security and public interest.



Respondents are correct in arguing that by restricting positions to certain foreign nationals without adequate justification, the British High Commission potentially contravenes established diplomatic protocols and affects equitable employment opportunities for qualified Indian citizens. Thus, Petitioner's reliance on the afore-mentioned advertisements does not substantiate the existence of reciprocity, as the contexts and eligibility criteria differ fundamentally. In light of these observations, the Court concludes that the principle of reciprocity, as claimed by the Petitioner, is not adequately established.

Residual grounds of challenge

24. Additionally, the Petitioner argued that Respondent's reliance on the Vienna Convention on Diplomatic Relations, 1961 is misplaced. He urged that the employment in question pertains to a non-diplomatic role and is not a permanent position within the UK Civil Service and, consequently, it does not fall within the scope of diplomatic immunities and privileges outlined under the Convention. Specifically, Article 1(f) of the Vienna Convention defines "*members of the administrative and technical staff*" as those employed in the administrative or technical services of the mission, and the Petitioner does not qualify as a "*member of the diplomatic staff*" under this provision. Further, Petitioner's counsel emphasized that the national security concerns raised by the Respondents are unjustified. The Petitioner maintains an unblemished educational and professional record. The position was secured following a stringent selection process involving an in-person interview, police verification, and submission of professional references. There are no adverse reports or incidents, either in India or abroad, that could substantiate any security-related apprehensions against the Petitioner.



25. The Petitioner's argument challenging the applicability of the Vienna Convention on Diplomatic Relations, 1961, is untenable. While the role in question may not be diplomatic *per se*, employment within a diplomatic mission inherently engages concerns of national security, reciprocity, and diplomatic propriety. Article 8 of the Convention states:

- "1. Members of the diplomatic staff of the mission should in principle be of the nationality of the sending State.*
- 2. Members of the diplomatic staff of the mission may not be appointed from among persons having the nationality of the receiving State, except with the consent of that State, which may be withdrawn at any time.*
- 3. The receiving State may reserve the same right with regard to nationals of a third State who are not also nationals of the sending State."*

26. While the Convention addresses the employment of diplomatic staff, the underlying principle grants discretion to the receiving state to approve or deny appointments of foreign nationals within diplomatic missions. This discretion is crucial for safeguarding national security and ensuring that diplomatic privileges are not misused.

27. The Petitioner may be having impeccable credentials and the merit he brings to the table, yet it is imperative to recognize that matters of national security and diplomatic relations transcend individual qualifications.

28. The Respondents' decision to deny the special work permit to the Petitioner is not a reflection on his personal integrity or capabilities but a prudent exercise of their mandate to protect national security. The denial, is founded on non-compliance of the procedures and the absence of requisite justifications from the British High Commission. The Court appreciates the Petitioner's aspirations and acknowledges the challenges faced. However, the sanctity of diplomatic protocols and national interests must prevail over



individual grievances. The Petitioner may explore other avenues consistent with the laws and regulations governing employment in diplomatic missions.

29. For the forgoing reasons, the Court finds no merit in the present petition. Dismissed.

SANJEEV NARULA, J

NOVEMBER 27, 2024

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